

UR Leisure Resorts Sdn Bhd v Malayan Banking Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
P-02-2233-09 OF 2012
MOHD HISHAMUDIN, AZIAH ALI AND LIM YEE LAN JJCA
4 FEBRUARY 2015

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Land Law — Sale of land — Order of court — Land charged to bank as security for loan — Default in repayment of loan — Application for sale of land to land administrator — Land administrator did not make any order for sale of land but referred application to High Court — National Land Code s 265(3A) — Whether land administrator had power to refer application for sale made under s 260 of the National Land Code to High Court pursuant to s 265(3A)

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The appellant was the registered proprietor of a piece of land ('the land') which was charged to the respondent as security for a loan taken by a third party. When the third party defaulted on the repayment of the loan, the respondent proceeded to apply to the land administrator for the sale of the land. Inquiries were held on various dates but the land administrator did not make any order for sale of the land but instead referred the application to the High Court. It was alleged that the appellant/chargor had disagreed with the reserved price proposed by the respondent/chargee and had made an application to the High Court. The High Court held that s 265(3A) of the National Land Code ('the NLC') must be read independently of sub-ss (2) and (3). Hence, the present appeal by the appellant. The issue that arose for the court's determination was whether a land administrator has the power to refer an application for sale, made under s 260 of the NLC to the High Court without previously having carried out a sale of the land at the land office twice pursuant to sub-ss (1), (2) and (3) of s 265.

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Held, allowing the appeal with costs:

- (1) With the introduction of sub-s (3A), the position does not change as there still must have been two prior unsuccessful sales by the land administrator before he can lawfully refer the matter to the High Court. What the amendment now makes clear, via a proviso to sub-s (3A), was that the High Court cannot, in exercising its power under sub-s (3A), in dealing with the reference, make an order to direct the Land Administrator to carry out a sale. Under the pre-amended provision of sub-s (3), it was not made clear as to whether the High Court, in dealing with the reference, had the power to make an order directing the land administrator to carry out the sale (see para 14).

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- A (2) The order of the High Court and the decision of the land administrator to refer the matter to the High Court were set aside. The matter was ordered to be sent back to the land administrator to carry out a proper inquiry in accordance with the provisions of s 261 of the NLC and to make the appropriate decision under s 263 of the same. Clause 30 of the explanatory statement to the bill was of no assistance to the construction of either the amended sub-s (3) or the new sub-s (3A). It does not contain a full and clear explanation as to the purpose of the amendments to s 265. The clause was a mere lip service effort to explain the purposes of the amendments; of little utility; and significantly, cl 30 had omitted to even mention, inter alia, the proviso to sub-s (3A) (see paras 13 & 15) .
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[Bahasa Malaysia summary]

- D Perayu adalah tuanpunya berdaftar sebidang tanah ('tanah tersebut') yang digadai kepada responden sebagai jaminan untuk pinjaman yang diambil oleh pihak ketiga. Apabila pihak ketiga mengingkari atas bayaran balik pinjaman tersebut, responden meneruskan untuk memohon kepada pentadbir tanah untuk jualan tanah tersebut. Siasatan dijalankan pada beberapa tarikh tetapi pentadbir tanah tidak membuat apa-apa perintah untuk jualan tanah tetapi sebaliknya merujuk permohonan kepada Mahkamah Tinggi. Ia didakwa
- E bahawa perayu/penggadai telah tidak bersetuju dengan harga rizab yang dicadangkan oleh responden/pemegang gadaian dan telah membuat permohonan kepada Mahkamah Tinggi. Mahkamah Tinggi memutuskan bahawa s 265(3A) Kanun Tanah Negara ('KTN') mesti dibaca secara bebas daripada sub-ss (2) dan (3). Maka, rayuan ini oleh perayu. Isu yang berbangkit
- F untuk penentuan mahkamah adalah sama ada pentadbir tanah mempunyai kuasa untuk merujuk permohonan untuk jualan, yang dibuat di bawah s 260 KTN kepada Mahkamah Tinggi tanpa sebelumnya menjalankan jualan tanah di pejabat tanah dua kali berikutan sub-ss (1), (2) and (3) s 265.
- G **Diputuskan**, membenarkan rayuan dengan kos:
- H (1) Dengan memperkenalkan sub-s (3A), kedudukan tidak berubah kerana masih terdapat dua jualan sebelumnya yang tidak berjaya oleh pentadbir tanah sebelum beliau dapat merujuk dari segi undang-undang perkara tersebut kepada Mahkamah Tinggi. Apa yang pindaan membuatnya
- I jelas, melalui peruntukan kepada sub-s (3A), adalah bahawa Mahkamah Tinggi tidak dapat, dalam menjalankan kuasanya di bawah sub-s (3A), dalam berurusan dengan rujukan, membuat perintah untuk mengarahkan pentadbir tanah untuk menjalankan jualan. Di bawah pra pindaan peruntukan sub-s (3), ia tidak dibuatkan dengan jelas sama ada Mahkamah Tinggi, dalam berurusan dengan rujukan, mempunyai kuasa untuk membuat perintah mengarahkan pentadbir tanah untuk menjalankan jualan (lihat perenggan 14).
- (2) Perintah Mahkamah Tinggi dan keputusan pentadbir tanah untuk

merujuk perkara tersebut kepada Mahkamah Tinggi diketepikan. Perkara tersebut diperintahkan diserahkan semula kepada pentadbir tanah untuk menjalankan siasatan betul mengikut peruntukan s 261 KTN dan untuk membuat keputusan wajar di bawah s 263 yang sama. Klausula 30 'explanatory statement to the bill' tidak membantu kepada pembentukan sama ada kepada pindaan sub-s (3) atau sub-s (3A) yang baru. Ia tidak mengandungi penjelasan penuh dan jelas terhadap tujuan pindaan kepada s 265. Klausula hanya usaha lisan untuk menjelaskan tujuan pindaan; terhadap kebergunaan sedikit; dan nyata sekali, klausula 30 telah tidak memasukkan untuk menyatakan, antara lain, peruntukan kepada sub-s (3A) (lihat perenggan 13 & 15).]

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Notes

For cases on order of court for sale of land, see 8(3) *Mallal's Digest* (5th Ed) para 5224.

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Legislation referred to

National Land Code ss 260, 261, 263, 265, 265(1), (2), (3), (3A)

Appeal from: Originating Summons No 24–393–03 OF 2012 (High Court, Pulau Pinang).

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Hardeep Singh Jessy (Hardeep Gurvin & Co) for the appellant.
Ramsun Ho Chii Huey (See Ramsun & Tan) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

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INTRODUCTION

[1] This appeal concerns a question of law: whether a land administrator has the power pursuant to sub-s (3A) of s 265 of the National Land Code ('the NLC') to refer an application for sale, made to the land administrator pursuant to s 260 of the NLC, to the High Court, without previously having carried out a sale of the subject land at the land office twice pursuant to sub-ss (1), (2) and (3) of s 265 of the NLC.

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[2] Section 265 states:

Procedure at sale

265(1) Where a sale is held pursuant to an order under s 263:

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- (a) the sale shall take place under the direction of the land administrator, who may take the assistance thereof of any licensed auctioneer; and
- (b) the chargee shall be entitled to bid at the sale.

- A** (2) If at the sale no bid is received at or above the reserve price, the land or lease in question shall be withdrawn from the sale, and the land administrator shall direct that it be put up for auction on a subsequent date, either at the same or at a new reserve price, and shall give such notice of the subsequent sale as he may consider appropriate.
- B** (3) If at the subsequent sale no bid is received at or above the reserve price, the land administrator may:
- C** (a) direct that it be put up for auction at a subsequent date, either at the same or a new reserve price and shall give such notice of the subsequent sale as he may consider appropriate; or
- (b) withdraw it from the sale and refer the matter to the court.
- (3A) The court may substitute for the order of the land administrator an order for sale under s 256 or make such other order as it may think just:
- D** Provided that the court shall not make any order to the land administrator to carry out the sale.
- (4) The purchaser at any such sale shall, upon payment to the land administrator of the full amount of the purchase price, be entitled to receive from him:
- E** (a) a certificate in Form 16I that the land or lease in question has been sold to him under the authority of this Act (which certificate shall, as provided by s 267, be registrable by the purchaser as if it were an instrument of dealing); and
- F** (b) if deposited with the land administrator pursuant to para 264(2)(b), the issue document of title to the land or, as the case may be, duplicate lease.
- (4A) Notwithstanding sub-s (4), where the chargee is a financial institution, the purchaser at the sale shall, upon payment of the full amount of the purchase price to the chargee and upon receipt of the certification in writing from the chargee not later than fourteen days following the payment of such sum, that the balance or the full amount of the purchase price has been paid, shall be entitled to receive from the land administrator:
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- H** (a) a certificate in Form 16I that the land or lease in question has been sold to him under the authority of this act (which certificate shall, as provided by s 267, be registrable by the purchaser as if it were an instrument of dealing); and
- (b) if deposited with the land administrator pursuant to para 264(2)(b), the issue document of title to the land or, as the case may be, duplicate lease.
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- (5) Where the order for sale under sub-s 263(2) requires the payment of any deposit by the successful bidder in any public auction and the balance to be settled on a date not later than one hundred and twenty days from the date of the sale, the provisions of s 267A shall apply.

THE FACTS OF THE CASE

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[3] The appellant was the registered proprietor of the subject land. The subject land was charged to the respondent bank on 17 February 1996 as security for a loan taken by a third party. The third party defaulted on the loan. As the subject land was held under a land office title, the respondent on 28 March 2006 proceeded to apply to the land administrator for the sale of the land pursuant to s 260 of the NLC.

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[4] It is not disputed that an inquiry was held before the land administrator on various dates (the last date being 20 December 2011), but the land administrator did not make any order for sale in respect of the subject land pursuant to s 263 of the NLC. Instead, purporting to act under s 265(3A) of the NLC, the land administrator 'referred' the application to the High Court.

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[5] In the case before us the land administrator purported to refer the application to the High Court via his letter dated 2 January 2012 because (according to para 3 of the letter) the appellant/chargor had disagreed with the reserved price as proposed by the respondent/chargee, and had applied that the matter be referred to the High Court.

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[6] The High Court purporting to act under s 265(3A) made an order for sale.

THE APPELLANT'S SUBMISSION

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[7] Before us the appellant submitted that, since there were no two unsuccessful auctions before the land administrator carried out pursuant to sub-ss (1), (2) and (3) of s 265 of the NLC, the land administrator had no power under sub-s (3A) of s 265 to refer the application to the High Court. Since the purported reference to the High Court was an invalid reference, a nullity, it follows then that the High Court had no power to make the order for sale; and that the purported order for sale by the High Court was a nullity.

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THE RESPONDENT'S SUBMISSION

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[8] The respondent, on the other hand, takes the position that sub-s (3A) of s 265 was inserted via an amendment to s 265 and the purpose of this amendment is to confer power to the land administrator to refer any application for sale to the High Court regardless of whether or not there had been prior unsuccessful sale (or sales) before the land administrator. In support of its argument, learned counsel for the respondent refers to para 30 of the explanatory statement to the National Land Code (Amendment) Bill 2000 which states:

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- A 30. Clause 30 seeks to amend section 265 of the Code to enable the Land Administrator, at the subsequent sale, to specify a new reserve price, to provide that the matter be referred to the Court, to enable the chargee to receive the purchase price of the sale by public auction of land held under Land Office title and to provide that the chargee shall certify in writing that the full purchase price has been paid before issuing the Certificate of Sale to the purchaser.
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DECISION OF THE HIGH COURT

- C [9] The learned High Court judge takes the view that sub-s (3A) of s 265 must be read independently of sub-ss (2) and (3) of the same; and that this must be the intention of Parliament when it amended s 265 via the National Land Code (Amendment) Act 2001 (Act A1104) that came into force on 1 December 2001 by deleting sub-s (3)(c) of that section and introduced sub-s (3A).
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[10] The learned High Court judge said in his judgment:

- E Having perused and considered both the pre-amended and post-amended section 265 NLC particularly sub-s (3) of the pre-amended provision and the present sub-ss (3) and (3A), I am of the view that the intention of the legislature to remove the power of the court from the old sub-s (3) and reintroduced as new provision (3A) with slight variations as submitted by the plaintiff above, is to give the court the power to make an order for sale under s 256 which may substitute for the order as it may think just except shall not order the land administrator to carry out the sale.
- F I agree with the submission by learned counsel for the plaintiff that sub-s (3A) being inserted as a new provision is therefore not subject to the provisions of sub-ss (2) and (3). I say so because the old sub-s (3) which contained paras (3)(a), (b) and (c) are conjunctive when 'and' is used after para (3)(b) and before para (3)(c) which the new sub-s (3)(a) or (b) is disjunctive using 'or' while new (3A) is inserted after removing it from the old (3)(c). It appears to me the clear intention of the legislature is the new sub-s (3A) is not a continuation of the process in sub-s (3)(a) or (b). Otherwise, the amendment would appear superfluous. Be that as it may, even by reading sub-ss (3) and (2A) proviso together, the 2 provisions are not repulsive but synchronize with one another. Sub-s (3) provides the land administrator with the 2 options of action ie if at the subsequent sale no bid is received at or above the reserve price, the land administrator may (a) direct auction at a subsequent date inter alia or (b) withdraw the sale and refer the matter to the court. The proviso to sub-s (3A) stated that the court shall not make any order to the land administrator to carry out sale. I find this to be distinctive so as not to infringe the discretion given to the land administrator under sub-s (3) to s 265 of the NLC. If sub-s (3A) is subject to sub-ss (2) and (3), there is no meaning in sub-s (3A) for the Court to substitute for the order of the land administrator as in (3)(a) where he may direct a subsequent auction, for another order for sale and as in (3) (b) where the land administrator may withdraw the sale and refer the matter to court and by the proviso in sub-s (3A), the court shall not order the land administrator to carry out the sale. I agree with the submission by learned counsel for the plaintiff that s 265(3A) NLC gives the court
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the power to make an order for sale in the event the land administrator is unable to do so such as in the instant case where the reserve price could not be determined by the land administrator after inquires.

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THE APPEAL

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[11] Dissatisfied with the decision of the High Court, the appellant/defendant appealed to the Court of Appeal.

SUBSECTION (3) OF S 265 OF THE NLC PRIOR TO THE AMENDMENT

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[12] Prior to the amendment of sub-s (3) of s 265, the subsection reads:

(3) If at the subsequent sale no bid is received at or above the reserve price:

- (a) the land or lease shall be withdrawn from the sale; and
- (b) the land administrator shall refer the matter to the court;
- (c) the court may substitute for the order of the land administrator an order for sale under s 256, or make such other order as it may think just.

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OUR DECISION

[13] On 26 May 2014 we allowed the appellant's/defendant's appeal with costs. We set aside the order of the High Court as well as the decision of the land administrator to refer the matter to the High Court. We order that the matter be sent back to the land administrator to carry out a proper inquiry in accordance with the provisions of s 261 of the NLC and to make the appropriate decision under s 263 of the same.

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OUR REASONS

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[14] With respect, we are unable to agree with the interpretation as adopted by the learned High Court judge that sub-s (3A) of s 265 should be read independently of sub-ss (2) and (3) of the same; and that the High Court has the power to make an order for sale under sub-s (3A), provided there was a reference to the High Court by the land administrator, even where there had been no two previous unsuccessful sales (in the sense of there being no bidders). If sub-s (3A) were to be read independently of sub-ss (2) and (3), as ruled by the learned High Court judge, then how does one explain the meaning of the words:

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refer the matter to the Court

in the present sub-s (3)? These words will only make sense if we were to read them together with sub-s (3A). We are of the view that it is clear that, with the

- A** introduction of sub-s (3A), the position does not change: there still must have been two prior unsuccessful sales by the land administrator before he can lawfully refer the matter to the High Court. What the amendment now makes clear — and this is via a proviso to sub-s (3A) — is that the High Court cannot, in exercising its power under sub-s (3A), that is to say, in dealing with the
- B** reference, make an order to direct the land administrator to carry out a sale. Under the pre-amended provision of sub-s (3), it is not made clear as to whether or not the High Court, in dealing with the reference, had the power to make an order directing the land administrator to carry out the sale.
- C** [15] We find that cl 30 of the explanatory statement to the Bill, as referred to by learned counsel for the respondent, is of no assistance to the construction of either the amended sub-s (3) or the new sub-s (3A). It does not contain a full and clear explanation as to the purpose of the amendments to s 265, and this is unfortunate. With respect to the parliamentary draftsman, we view the clause
- D** as a mere lip service effort to explain the purposes of the amendments; of little utility; and, significantly, cl 30 had omitted to even mention (let alone to explain the purpose of), among others, the proviso to sub-s (3A).
- E** [16] Appeal allowed with costs; order of High Court set aside; matter send back to the land administrator to hold an inquiry in accordance with the NLC.

Appeal allowed with costs.

Reported by Afq Mohamad Noor

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